BENCH AND PRESS.

Continued from First Page.

lished in the Wheeling INTELLIGENCER of June 18th, 1884, could be construed as a contempt of this Court, that publication in the Greenbrier *Independent* was likewise such contempt.

No proceedings against Mr. Harlow for contempt, however, have been instituted in or by this court, or by any of its judges. None of its judges have brought an action of libel against Mr. Harlow, or made complaint upon the criminal side of the courts against him, although the judges of this honorable court and each of them must have known, and respondent believes did know, of these statements from a time shortly after their publication. None of the said judges, and no one for them, has in any manner denied the charges so made by Mr. Harlow and no retraction or qualification of those charges has ever been made in any public manner or to the knowledge of this respondent.

The statements so made by the Greenbrier *Independent* were brought to the knowledge of Jacob B. Jackson, then Governor of the State of West Virginia, and Joseph S. Miller, Auditor of the said State, each of whom more than once assented to the truth of the statements so made in this respect by the Greenbrier *Independent*.

The said Jackson and Miller were, by reason of their official position, liable to know, and respondent believes they did know, whether the said statements of the Greenbrier *Independent* were true, and aside from their official position they are, and always have been, men of good standing and reputation.

Respondent respectfully submits that if the statements contained in the Greenbrier *Independent* were true, it was the duty of the Wheeling INTELLIGENCER and its editors, publishers and proprietors, including its chief editor, on the 18th day of June, 1884, and at all other times, to make public those statements, and that on the 18th day of June, 1884, they were, under the circumstances hereinbefore stated, justified in believing the truth of those statements. The said editorial article was based upon those statements, referred to them, and was known and understood by every one who read it to relate to those statements.

Respondent respectfully suggests that if any question is now made as to the truth of those statements said B. F. Harlow, Jacob B. Jackson and Joseph S. Miller be examined as witnesses at the bar of this court, or in such other manner as may be in accordance with law and the practice of this court, and that such other evidence be taken as may be pertinent and proper.

Some time since the said Joseph S. Miller was a candidate for the nomination for Governor at the hands of the Democratic State Convention, called to meet in Wheeling on the 23d day of July, 1884. Subsequently, and about the 7th day of June, 1884, he wrote and published a letter declining to be such candidate.

Very soon afterwards the said Miller presented to this honorable court a petition for a mandamus against T. H. Buchannon, Assessor for Brooke county, and an effort was made in his behalf to push that proceeding to an early decision. It was understood among the friends of Mr. Miller's candidacy that that effort was made in order that if the decision should be favorable to the Auditor, Mr. Miller might still go before the convention as a candidate for nomination as Governor with hopes of success. For evidence of this respondent refers to the affidavit of T. J. Parsons, filed herewith.

At the time this Honorable Court granted the rule at the suit of said Miller, Auditor, and fixed the return day thereof, which was but six days off, the Court publicly announced that the respondent, Buchannon, must be prepared to go on with the argument of the matter upon the return day, and caused the Clerk of this Court to so inform Mr. Buchannon by letter, which is herewith produced and filed. This proceeding upon the part of the Court was unusual as respondent is informed and believes. The editors, publishers and proprietors of the INTELLIGENCER were before the 18th day of June, 1884, informed of the facts last hereinbefore stated, except the existence of the letter from the Clerk of the Court to Mr. Buchannon, but did not then know what they have since learned, that the provision of law requiring the Assessor to complete his books by the 1st day of July, may have operated as a reason for such action of the Court, that fact not having been stated either in the public announcement of the Court, or in the letter of its Clerk.

Under such circumstances the editorial article complained of was written and published. It is not true that it was an attempt to affect the decision of the Court in the case of Miller vs. Buchanan, or to intimidate the Court into deciding against the relator. No editor, publisher or proprietor of the INTELLIGENCER had any interest in that case; none of them knew of its existence on or before the 18th day of June, 1884, except he whom on that day was the chief editor of the paper. The then chief editor supposed that the decision of the case might have a political effect in the State, but supposed, also, that whichever way it was decided the effect would be such as he desired. If he had any preference in the matter from his political stand-point it was that the Court should decide in favor of the Auditor.

The publication of the said editorial article was not made with a view to induce any particular decision by the court, or to effect in any way its determination of the case, and respondent is unable to see how it could be construed by any one as being so intended. In its publication there was no intention to commit or express a contempt of the court, and no such feeling was entertained by the then publishers and editors of the INTELLIGENCER. The date of the publication may have been untimely and if it had been considered that the publication of the said article could be construed by any one as an attempt to intimidate or influence the court in the case of Miller vs. Buchannon, no such article would have been published during the pendency of that case. The fact that such case was pending simply served to bring to mind the statements of the Greenbrier *Independent*, the facts mentioned by Mr. Parsons and the action of the court in awarding the rule against Mr. Buchannon, and so suggested the publication of the article complained of.

Wherefore this respondent respectfully submits that the said rule against him to show cause why he should not be attached for contempt should be discharged.

C. B. HART.

W. P. HUBBARD,
JNO. A. HUTCHISON,
Attorneys for Respondent.

State of West Virginia, Ohio county, to wit:

C. B. Hart, the respondent named in the foregoing answer, being duly sworn says, that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information he believes them to be true.

C. B. HART.

Taken, sworn and subscribed before me this 28th day of June, 1884.

J. R. COWDEN,
Notary Public in and for Ohio county, West Virginia.

Affidavit of T. J. Parsons.

State of West Virginia, Ohio county, s. s.:

Personally appeared before me Joseph R. Paull, a Notary Public in and for said county, T. J. Parsons, who being duly sworn, says on his solemn oath:

I reside in Moundsville, Marshall county, West Virginia, and am an attorney at law.

On some day in the present month which I am unable to fix more definitely than that it was after the petition had been filed by Joseph S. Miller, auditor, in the Supreme Court of Appeals, and before the case was argued, I was in company with Col. Robert White, of Wheeling, and L. S. Newman, of Marshall county, at the dinner table of the Henratta House, in Moundsville. Both these gentlemen are prominent and active Democratic politicians, and Col. White is a lawyer practicing in Wheeling and a member of the bar of the Court of Appeals.

I am a Republican. These two gentlemen were not then acquainted with me, or if they knew me, did not recognize me. On the occasion I have mentioned these gentlemen conversed earnestly about the political situation in this State, their favorite candidates for different offices and the chances of such candidates for success. Both of them spoke warmly in favor of Joseph S. Miller, now State Auditor, as a candidate for the Democratic nomination for Governor.

Col. White said to Mr. Newman that in case the assessment order, which had been made by the Auditor, should be held constitutional by the Supreme Court of Appeals, Mr. Miller would, notwithstanding his previous letter of declination, be a candidate before the Democratic State Convention to be held July 23d next, for nomination for Governor, and would be successful. In that connection Col. White said it would be the object of Mr. Miller's counsel in the mandamus case to push it to an early decision, because of the effect that such a decision, if favorable to Mr. Miller, would have on his candidacy before the convention and on the general interests of the Democratic party. Towards the close of the conversation I took part in it, and said that what Mr. Miller had done with regard to the assessment order had been done in the interest of the Democratic party, and I didn't think it fair to shoulder on him all the political consequences of such order. This remark, I presume, led Col. White to suppose that I was a Democrat, for after dinner he approached me and requested me to come to the Democratic Convention of July 23d as a delegate in favor of Mr. Miller. I informed him that I was a Republican. Since that I have not heard Col. White say anything on the subject.

[Signed] T. J. PARSONS.

Subscribed and sworn to by the said T. J. Parsons before me, in my said county, this 27th day of June, 1884.

JOSEPH R. PAULL,
Notary Public in and for Ohio County.

The Court Notifies the Brooke County Assessor.

Supreme Court of Appeals, State of West Virginia:

WHEELING, June 6, 1884.

T. H. Buchanan, Esq., Wellsburg:

DEAR SIR:—In awarding the alternative writ of *mandamus* in the matter of the complaint of Auditor Miller against you, the court states that it desires to have the case submitted for decision on next Friday, June 13. It will be necessary for you therefore to prepare and present your answer at that time with such argument as you desire to make. I would suggest also that you endorse upon the writ which is handed to you by the crier of the court, either that you have complied with the order therein contained, or that you have not done so for reasons stated in the answer which you file along with the writ—that is, return the writ here on next Friday with endorsement referring to your answer. I write to assure you that the court will not, unless for very strong reason, delay the hearing of the case beyond the day named, and that it is therefore of the utmost importance that you be ready at that time.

Yours very truly,
O. S. LONG, CLERK.

Judge Johnson—Do you wish to be heard gentlemen, and if so, when?

Mr. Hubbard—I would say in answer to the inquiry of your honor, we certainly desire to be heard. We are a little at sea as to the proper or usual practice in matters of this sort. We had supposed that some one would have been designated by the Court to appear in behalf of the State.

Judge Johnson—Not at all, not at all. If it is not clearly proper that these parties should be punished it will not be done.

Mr. Hubbard—I mentioned that because that matter might affect the time as to when it should be heard.

Judge Johnson—There will be no argument on the other side.

Mr. Hubbard—We have not had time to prepare ourselves for the argument of these rules.

The Court then fixed Tuesday, July 28th, 1884, as the time for hearing the arguments of counsel.

SECOND DAY IN COURT.

Able Arguments of Mr. Hubbard and Mr. Hutchinson on the Law Points.

On Monday, June 23, the court sat to hear argument and was addressed by Messrs. Hutchinson and Hubbard.

Mr. Hutchinson's Argument.

Mr. Hutchinson opened for the defendants. He pointed out that if the provisions of the statute relied upon in the answer of the defendants were not binding upon this Court, they were not binding upon any of the inferior courts, or upon justices of the peace, and that this Court could not assume the arbitrary and uncontrolled power of punishing summarily for a constructive contempt without at the same time admitting the existence of such power in a justice.

Mr. Hutchinson showed the difference between direct contempts, or those committed in the face of the court, and constructive contempts, embracing publications supposed to reflect upon the court, and called attention to the fact that, while in England courts had punished such constructive contempts summarily, yet that even there no case for constructive contempt was reported prior to the American Revolution, so that it could not be said that the practice came to this country as part of the common law. In most of the United States statutes have been enacted divesting the courts of such power. Wharton's Criminal Pleading and Practice, sections 957-961. He also referred to the case of Story vs. The People, 79 Ill. 45, as holding that the court would not exercise these common law powers as to publications which do not obstruct courts in the exercise of their functions.

Mr. Hutchinson quoted largely from the proceedings upon the impeachment of Judge Peck, citing among the expressions of the distinguished men who took part in that trial, Mr. McDuffie, the eminent lawyer and statesman of South Carolina, said: "I am aware that it may be contended, with some show of plausibility, that to punish a contempt, by the process of attachment, is not the exercise of a criminal power, because it is exercised in England by the courts of common pleas and chancery equally with the Court of King's Bench. But I humbly conceive, may it please the court, that such an argument is sacrificing the substance of the thing to the mere form of proceeding. A man is called up before a judge—a chancellor, if you please—upon a charge of being guilty of publishing a libel against the court, and without any of the forms of proceeding intended to secure a fair and impartial trial to every citizen; without either the advantage of an indictment to apprize him of the offense alleged against him, or a jury to secure him from the excited vengeance of the offended chancellor, he is pronounced guilty of a false and malicious libel, and subjected to as high a punishment, nay, to a higher punishment than could be legally inflicted by a court of general criminal jurisdiction, after a solemn trial and conviction by an impartial jury of his peers. And yet according to the argument I am answering, though a citizen is thus pronounced guilty of an infamous offense, and punished with the utmost severity of the law, it is no assumption of criminal power by the court, for the very extraordinary reason, that the sentence has been pronounced, and the punishment inflicted, without the forms of a trial, and by a court which is not invested with a general jurisdiction to try and punish offences! Such an argument as this, addressed by a judge to a citizen who should complain of the exercise of usurped power, would be the most outrageous mockery by which judicial tyranny could add insult to the injury inflicted. * * * The power to punish libels as for contempts is not only a criminal power, but a criminal power more dangerous to public liberty than any that has ever been exercised by our courts of justice; and is, therefore, the very last of the criminal powers which the courts of the United States should assume to exercise on the authority of the common law of England."

With regard to the inherent power of courts to punish for contempt, Mr. McDuffee said:

"The administration of justice must be actually obstructed. It will not do to rely upon a mere constructive interference, impeding the course of justice by some far-fetched implication. I am aware that certain notions of judicial prerogative have been imperceptibly introduced into this country, from the loose phrases in the elementary books of English common law, and in the opinions of English judges; and that our judges and lawyers have, in this manner, become imbued with principles which are utterly incompatible with every just conception of liberty. * * * There is hardly any latitude of licentiousness which it were not better to indulge, in canvassing the conduct of public men, than to run the hazard of restricting the liberty of discussion and the freedom of the press under the color of restraining its abuse."

Mr. Buchanan, afterwards President of the United States, in the same case said:

"The Constitution and the laws of the several States have conferred upon juries, under the advice of the Court, the trial of the crime of libel. A jury is the only tribunal to which the liberty of the press can be safely entrusted. To allow the judiciary to dispense with this tribunal whenever any publication has been made affecting the dignity or the official conduct of a judge, is to create a privileged class of men in the State whose will is law, and who are not only judges in their own cause of the guilt of the accused, but also of the extent of his punishment. Such a power, so far as it goes, partakes of the very essence and rankness of despotism."

Among the first statutes on the subject was that passed by Congress limiting the power of courts to summarily punish for contempts to cases of misbehavior in the presence of the court, or on the part of its officers, and to disobedience of its orders.

The statutes passed in the several States resemble this, among them the statute of West Virginia, referred to in the answer, which has been in force in Virginia and in this State ever since 1831. The Virginia statute was held valid and binding in the case of the Commonwealth vs. Deskens 4 Leigh 685.

The defendants relied upon the provisions of the State bill of rights, that no person shall be deprived of life, liberty or property without due process of law, and the judgment of his peers, (Constitution, Article III, Section 10), and that trials of crimes and misdemeanors, unless herein provided, shall be by a jury of twelve men, (Section 14); that all powers are vested in, and are consequently derived from the people. Magistrates are their trustees and servants, and at all times amenable to them. (Section 2). The Constitution, Article VI, Section 39, gives the Legislature power to provide by general law for regulating the practice in the several courts of justice, a provision which, if any was needed, would warrant the Legislature in enacting, Section 27 of Chapter 147 of the Code, being the statute set out in the defendants' answer.

The Supreme Court of Appeals is established by the constitution and has only such jurisdiction as by the constitution is conferred upon it. It is not a court known to the common law and has no common law jurisdiction. Exparte Ballman, 4 branch 92; exparte Hardy, 68 Alabama 303; State vs. Wooley, 11 Bush; Whittem vs State, 36 Indiana 196; 1 W. & M. 440; 5 Caldwell 526, exparte Hickey 4 S. & M. 336; People vs. Yates, 6 Johnson.

Proceedings to punish for contempt are criminal in their nature. 9 Watts 431, 42 California 412; Wheeling vs. B. & O. R. R. Co., 13 Gratt. 40, and other cases.

Will the court declare the provisions of the code in conflict with the constitution? Section 30 of the same statute provides punishment for an offense of this nature as a misdemeanor. These proceedings can only be maintained by considering that section unconstitutional.

The people reserved the right to legislate on this subject when they declared magistrates amenable to them.

An act cannot be declared void simply because it conflicts with what the court may suppose to be the spirit prevailing in the constitution.—Cooley on Constitutional Limitations.

The inherent right of courts to punish for contempts exists only in cases of actual contempt, for it is in only on such cases that the former is necessary.

The power to punish for contempt is analogous to the right of self-defense. It is to be exercised only in self protection, and neither a court nor an individual has the right to go further than is necessary to defend himself.

Mr. Hutchinson closed his argument by an appropriate quotation from Dr. Leber's Political Ethics, relating to the independence of the judiciary.

Mr. Hubbard's Argument.

Mr. Hubbard followed for the defendants. He insisted that the rule was improvidently awarded because it was not founded on affidavit. He cited as cases in which an affidavit had been held necessary Bates' case, 55 N. H. 325; In re Judson 3 Blatch 148; 10 S. C. 35; 36 Ind. 196; 13 Nebraska 451; 65 N. C. 365 and Burn's case 9 Wheat 529, and challenged the production of a contrary decision of any court. If the matter complained of took place in the presence of the court, no affidavit was needed, but for example, how could the court know judicially, or in what method known to the law had it learned that C. B. Hart was chief editor of the INTELLIGENCER?

Mr. Hubbard further claimed that the rule was improvidently awarded because there was no charge that defendants had published the article complained of, this proceeding is criminal in its nature, 13 Gratt 40. The same degree of certainty is required as in a criminal prosecution, 13 Neb. 445, 11 Bush (Ky.) 99. It was expressly held in ex parte Ireland 38 Tex. 344, that the proceedings were bad for want of a direct averment that the defendants had published the obnoxious article. Here there is no such averment, and not even an averment that they were the publishers or editors of the INTELLIGENCER at the time the article was published.

Proceeding to the discussion of the statute limiting the powers of courts with regard to contempts, Mr. Hubbard argued that the statute was well and wisely drawn. Only such powers are inherent in a court as are necessary to the undisturbed administration of justice by it. All these powers are saved to the courts by the statute; and the Legislature very wisely limited the amount of punishment in the first class of cases mentioned in the statute, for it was in that class that the personal resentments of Judges would most likely be found. All powers not necessary are taken away by the statute. This, however, does not interfere with the punishment of contempts after conviction upon indictment, or with the power of the courts to bind over the accused to keep the peace or to answer an indictment.

There is but one case holding invalid such a statute as ours, Morrill's case 16 Arkansas, and in that case no punishment was inflicted, the Court having taken six months to cool off. On the other hand such statutes have been held valid and Constitutional by the courts of North Carolina, (65 N. C. 353); Iowa, (6 Iowa 245); Tennessee, (5 Cold 221); Florida, (11 Fla. 174); Mississippi, (4 S. & M. 751); Illinois, (3 Scammon 395); California, (42 Cal. 412); New York, (5 Hun 317); Pennsylvania, (1 Grant's cases 353); Connecticut, (Middlebrook's case 43 Conn.); the United States, (1 Kent's Com. 301; 1 Wall, Jr., 1 and 12 Am. Dec. 180 note); and Virginia, (4 Leigh 685)

Suppose all these courts were wrong and the Arkansas Court right, still in view of the law thus settled in all these States what becomes of the argument of necessity. The power to punish for constructive contempt cannot be necessary when in a dozen leading States, the courts get along without it, and the administration of justice is at least as much respected in those States as in Arkansas.

To punish summarily for contempt is forbidden by Art III, Section 10 of the Constitution, under which no one can be deprived of life liberty or property without due process of law and the judgment of his peers.

Mr. Hubbard next inquired, what is the gravamen of the charge here? Is it that the editorial was insulting to the judges or that it was an attempt to influence the determination of a pending case? If the former, this is not the proper method of punishment. The judges cannot convince the public that the punishment is not dictated by passion. Let the proceeding be by indictment or civil suit, where there can be cross examination.

There is no necessity for this proceeding. The power to punish for contempts is preservative not vindicative. It is like the right of an individual in self defense. He may make himself safe. Having done so, he can not proceed to punish his adversary.

If the power to punish for constructive contempts is necessary to the judiciary, why is it not necessary to the executive? This court has recently held in the assessment case that the Governor is vested with *quasi* judicial functions. When he exercised them with respect to the duty of assessors, there was a free expression of opinion by newspapers and people, and some of it might be construed into contempt of the Governor, for it was unrestrained in language and directly counselled the assessors to disobey the Governor. Who supposed it was necessary that the Governor should have power to punish for contempt in order that his official duties might be performed?

Will it increase the respect due judicial tribunals to see a judge at once informer, prosecuting attorney, committing magistrate, grand jury, judge and petit jury in his own case, when the courts are open to redress any wrong in the ordinary manner, and their doors are high enough to admit judges who have been injured.

Suppose a court should proceed to punish for a publication, and then a prosecution for libel should be instituted upon the same publication, in which a jury should be sworn, and that upon their oaths they should say the defendants had told the truth—that their criticisms were just—that their publication was made with good motives and justifiable ends, would not the situation of such a court as well as of the defendants be unenviable?

It may be said that the popular opinion which will be entertained of such a proceeding as this is not to be considered. If that be so, the argument must be abandoned which seeks to sustain this proceeding, because the publication was calculated to impair public confidence in the integrity of the Court, and because this proceeding is intended to restore and maintain that confidence. Popular confidence is but another word for popular opinion. What that opinion has been of such a proceeding as this is easily ascertained from the fact that statutes limiting the power have been passed in almost all the States. In some of them the exercise of this arbitrary power by the judges has led to their impeachment. In Passmore's case the Supreme Court of Pennsylvania punished summarily a person who had posted in a coffee house a placard relating to their proceedings. For this act the three judges of that court were impeached, more than three-fourths of the lower house voting for it, and were found guilty by more than a majority of the Senate, but escaped because there was not a three-fourths vote against them. And there followed at once the Pennsylvania act of 1809 forbidding the summary punishment of constructive contempts.

When the Dred Scott decision was made by the Supreme Court of the United States, Abraham Lincoln, a member of the bar of that court, attacked the decision in a most bitter speech, but the Court if mistaken in the decision made no mistake in failing to attach Mr. Lincoln for contempt. If they had punished him for what he said, would their act have been calculated to maintain or increase public confidence in the Court?

If this proceeding is supposed to be maintainable because the publication can be construed as an attempt to influence the decision of the court, the defendant is entitled to be discharged, for he has purged himself by his answer and disclaimed any intent to commit or express contempt of the court. The question in this respect being one of intent, the defendant must be tried by his own answer. In re Walker 82, N. C. 95; Wells' case 21 Gratt 595; Ex parte Moore 63 N. C; Ex parte Biggs 64 N. C; Morrill's case 16 Arkansas.

It has been suggested that the answer might be considered as an aggravation. This was, of course, not so intended, and cannot be so construed. It was only just to both the court and the defendants that the court should be able to see and understand all the circumstances under which the publication was made as they were seen and understood by those who made the publication.

THE CASE DECIDED.

Judge Johnson Delivers a Lengthy Opinion and Judge Green Flees for Prison.

The following is the syllabus and abstract of the opinion as delivered by Judge Johnson:

Syllabus.

First—When a contempt is not committed in open court the usual course is to issue a rule to show cause why an attachment should not issue, though the attachment sometimes issues in the first instance.

Second—Such rule is usually based, in cases of constructive contempt, on an affidavit or other sworn statement of the facts constituting the alleged contempt, but this is not always essential. The Court may on its own information or on the unsworn statement of a member of the bar, in cases where the facts are clear and unmistakable, such as contemptuous publications in a newspaper.

Third—When the rule has issued on an unsworn statement of a counsel, though it may be defective in form or substance, yet if the defendant appears and answers, admitting facts sufficient to constitute the offense alleged against him, the Court will not regard objections to the proceedings for the want of an affidavit or sworn statement, or on account of defects in the rule, though the objection is made in his answer.

Fourth—The Supreme Court of Appeals of this State has the constitutional power to punish as for contempt the publication of a libel on the court or the judges thereof, acting in their judicial capacity, made during the term of the court, with reference to a case then pending and undecided.

Fifth—This power to summarily punish contempt is inherent in all constitutional courts, springing into existence upon their creation, as a necessary incident to the exercise of the powers conferred upon them, and applies as well to constructive as direct contempts.

Sixth—The act of the Virginia Legislature of 1831, in reference to puishment for contempt of court, which has been handed down through successive codes, and is now found in Chapter 147 of the Acts of this State, was not intended and does not apply to the Supreme Court of Appeals.

Seventh—In this State the power of the Supreme Court of Appeals to punish summarily both direct and constructive contempts is the same as it existed at common law.

Eighth—A publication in a newspaper in the city where the Supreme Court of Appeals is sitting, with reference to a case then pending and undetermined, charging three of the four Judges of the Court with attending a political caucus more than a year before, and advising the action out of which the case arose, and promising the caucus to hold its action legal and proper, and charging the Court with agreeing to decide the case before an approaching political convention, for political purposes, is a contempt of said Court which it may summarily punish.

The Opinion.

We are well aware that the trust reposed in us to protect the people's court from degradation, is delicate as well as sacred. The power claimed, it is said, is arbitrary and liable to abuse. That is no reason why the power should not exist and be reposed somewhere, and the few cases in which it has been used in a century shows it is not unsafe in the hands of the courts. It is well established by the authorities that the power is inherent in courts of justice to punish constructive as well as direct contempts, and in this country, where the courts are in the divisions of power by the Constitutions of the several States, constituted a separate and distinct department of government, clothed with jurisdiction and not expressly limited by the Constitution in their powers to punish for contempt, the inherent power that is thus necessarily granted them cannot be taken away by the legislative department of the Government. * * * Courts will tolerate the regulation of the power so that the Legislature does not by such regulation virtually destroy the efficiency of the Court. It must have just enough power, and will exercise it for its own protection, and it wants and demands no more. And of the question whether the Legislature in its regulation has left sufficient power for the purpose, the court which is called to exercise it must be the exclusive judge, unless its judgment may be reviewed, and in that case the Court of last resort would be the exclusive judge. There is no disposition in the Court to desire an exercise of this power, and it will not be exercised unless there is a necessity for it. When a judge remembers that he has no right to avenge in this manner individual wrongs, but an injury to the Court, the people's Court, it becomes a matter of stern and inflexible duty, from the performance of which under his official oath he dare not shrink. For he well knows that as the ermine was spotless when he put it on the people expect him to leave it as untarnished for his successor. We have been considering whether the Legislature had the right to limit the power of Courts created by constitutions. It is very different as to their power over courts of their own creation.

[The Court here considers the bearing of the act of 1831 on this case, and held that at the time it was passed, the Courts of Virginia existed by virtue of legislative enactment, and were therefore subject to legislative control. Judge Woods prepared this part of the opinion. Judge Johnson then continues:]

That statute that has been handed down and is now in our Code under the changed condition of the State government, might be constitutional now as to the Circuit Courts, as under the principle before announced it might be deemed a regulation of the power of courts in their punishment for contempts, as it leaves power to the Circuit Courts by indictments under their own supervision to punish constructive contempts of the character we are considering. Whether such power, under the Code, is sufficient for the protection of said courts we will not now determine, leaving that question to be decided when we are required to do so. Neither is it necessary to decide whether the Legislature could limit the power of this court to punish for constructive contempt, as to us it is evident it has not intended to do so. We would not upon settled principles decide an act of the Legislature to be unconstitutional unless it were necessary. The whole scope of the statute shows that it was intended to apply to inferior courts, and not to the Supreme Court of Appeals. The 28th section provides for the punishment of direct contempts without a jury, so that the fine shall not exceed $50 and the imprisonment more than ten days; "but," it further provides, "the court may in any such a case impanel a jury (without an indictment or any formal pleadings) to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict." This court cannot impanel a jury. It has no machinery to carry out the requirements of the statute, and therefore it is clear to us that the Legislature did not intend it to apply to this court. This court, then, has the unrestricted power, uncontrolled and unregulated by statute, to punish by fine or imprisonment, or both, direct and constructive contempts.

Is the publication complained of here a contempt of this Court? It seems to us that the books do not furnish a clearer contempt. It is a contempt, because it charges three of the judges of this court, acting in their judicial capacity, with an offense which, if true, is just grounds of impeachment, with an offense calculated to degrade the Court, and destroy all confidence of the people therein. If to charge three of the judges of this Court to have attended a political caucus and advised a certain action by the caucus, coupled with the promise to the caucus made that as a court they would sustain that action, and then in pursuance of that pledge, made to the caucus more than a year ago, the same judges as a court were about to decide the case then before them as the caucus desired, is not a contempt, then it seems to us that nothing would constitute a contempt. If to charge a court, or a majority of it, of having prostituted their high and sacred trust to base political purposes, is not a contempt, then we may truly say that such a thing does not exist. The article on its face shows, moreover, that it was intended to influence the decision of the court in the cause to which reference is therein made, and which was then pending, or to prevent the court from deciding it at the present term. That it had no such effect is not material, so far as the contempt is concerned. It first says, "The campaign is shaping itself. It leaks out that the Supreme Court of Appeals is to be brought to the rescue in a decision affirming the unconstitutionality of the exemption act, and declaring the supplemental assessment order to be lawful and right. This is, in effect, what was promised by the three Supreme Court judges to the Democratic caucus before the order was issued." Again, "Three out of four judges of the Supreme Court told the Democratic caucus more than a year ago to go ahead and rely on the backing of the court." This is a charge of infamy against the court. But it is further charged that the decision should be hastened by the court against the interests of one of the candidates for nomination for Governor, thus again charging the court of using its power for political purposes. Then comes the clause the manifest intent of which was to compel the court to decide against its convictions or not now decide at all, and charging it with being capable of deciding a case, not from its convictions, but as revenue or political desires might dictate. In every aspect of the case the publication is clearly a contempt of this court.

Can such a publication be palliated or excused? Far be it from us to take away the liberty of the press or to the slightest degree interfere with its rights. The good of society and of government demands that the largest liberty should be accorded the press, which is a power and an engine of great good. But the press itself will not for a moment tolerate such licentiousness as is exhibited in said editorial. The press is interested in the purity of the courts, and if it had no respect for the judges on the bench it should respect the court, for after the judges who now fill the bench are only remembered in the decisions they have rendered, the court still remains; it never dies; it is the people's court, and the press as the champion of the people's rights is interested in preserving the respect due to the court.

Have the defendants purged themselves of the contempt? The defendant Frew disclaims all knowledge of the pendency of the suit or that the article was published until he read it in the paper. We think he cannot be entirely acquitted, but that he should suffer a slight punishment. He should not allow the paper of which he is the publisher to indulge in such libelous editorials. The defendant Hart stands on different ground. His answer is a great aggravation of his contempt. He does not express the slightest regret for his act, nor does he exhibit a particle of regard for good order or indicate in any degree appreciation of those great principles that lie at the foundation of good government. By his answer he seems to regard the highest court of the State as a proper subject of libel provided he can by such libelous publications gain a political advantage. He seems to forget that it is the court of the whole people, and can only have their respect as long as it holds their confidence. So far from expressing any regret, he attempts to justify himself by another publication, in another paper, which publication, he said, led him to believe the charge was true, and he felt it his duty to publish it. And he says if this article was libelous, so was that; and further, that one of the judges of this court was an intimate friend of the editor of the other paper, living in the same town, and the court had not denied the truth of that statement. The court had not denied it? The court does not deny any charge made in the papers in reference to it. It can only deny a libelous charge in one way, and that it has done in this case in the only way it ever denies such a charge. Besides, it is very apparent that this article published on the 18th of June is very different from that which purports to have been taken from the Greenbrier *Independent*. It is not even charged that the Greenbrier *Independent* said "three of the judges attended a Democratic caucus, advised its action and promised as a court to back it," and that the court was now about to keep its promise. The answer is a very reckless one, and after all that the defendant swears that "in its publication there was no intention to commit or express a contempt of the court, and no such feeling was entertained by the then publishers and editor of the INTELLIGENCER."

It will not be accepted as reason for discharging a rule to show cause why the defendant should not be attached for publishing a libel on the court in a newspaper, that the respondent in his answer disclaims any intention to commit or express a contempt for the court. The meaning and intent of the defendant must be determined by a fair interpretation of the language used by him in the libelous article.

As a further excuse he says that the court announced at the time the alternative writ issued in the mandamus case, that the respondent must be ready to proceed with the case on the return day and directed the clerk to so inform the defendant; and that he did not, at the time the article was published, know that the law required the assessors' books to be returned before the first of July. He must have known when the article was published that the court had given the respondent six days for preparation after the return day of the writ. He says the court did not announce its reason for the necessity of having the case decided with dispatch. This all shows how ready the defendant was to do the court injustice. Did he have the proper respect for the court, he would suppose they had good reasons for their judicial action, and it is not necessary at all times to give them.

There is nothing in said Hart's answer to palliate his offense, but it's aggravated instead. This is a case in which the Court would be justified in both fining and imprisoning C. B. Hart. The contempt is of the most aggravated character. The books fail to show one that is any more so. But a majority of the Court is of opinion that the ends of public justice will be attained in this case by the imposition of a fine. For more than a century so far as I know in Virginia but one case of constructive contempt is found in the reports, and none in this State until now. And it is sincerely hoped that another centennial will arrive before the necessity again presents itself. As this is the first case of this character in this State we dislike to be severe. We would gladly discharge the rule if we could. It never would have issued had we dared consult our feelings in the matter. It is the unanimous opinion of the Court that an attachment issue against John Frew and C. B. Hart, returnable forthwith.

[From the portion of this opinion relative to the proper penalty to be assessed, Judge Green dissented, and read an opinion in which he announced that in his judgment the defendants should be imprisoned, and that the counsel for the defendants had also committed contempt in alleging in the answer statements which they must have known to be false, and he thought counsel should also have been punished for contempt.]

The Moral Lecture.

Mr. Frew and Mr. Hart being in Court, Judge Johnson said: You, John Frew and C. B. Hart, are before this Court under an attachment for contempt in consequence of an article relating to a cause in this Court, and published in a newspaper of which you and A. W. Campbell are the publishers, and you, C. B. Hart, are the editor-in-chief.

In the opinion delivered by this Court we have said all that we desire to say in regard to the character of the publication and the injury which such publications tend to cause to the administration of justice. It was there held that your answer showed no reason why an attachment should not issue. It now only remains to impose on you a penalty for the offence.

It is in the power of this Court to punish in this summary way such constructive contempts as that of which you have been found guilty, both by fine and imprisonment. We have no desire to inflict a severe penalty. Our object will be accomplished if we show to you that the law will not tolerate publications the direct tendency of which is to degrade, influence and obstruct courts in their administration of justice.

We are not unmindful of the fact that you, John Frew, did not know that such editorial article was to be published until after its publication, and will therefore inflict upon you a nominal fine.

But with you, C. B. Hart, the case is different, because in your answer, while admitting that you were the chief editor of the paper and inserted said editorial therein, you attempt to justify yourself in a manner which aggravates your offense, and we shall impose upon you as moderate a fine as the circumstances will allow, as we cannot believe that you will in the future commit a similar offense.

You, John Frew, are adjudged to pay a fine of $25, and you, C. B. Hart, are adjudged to pay a fine of $300, into the treasury of the State. You are also adjudged to pay the costs of this proceeding. The fines will be paid to the clerk of this court, who is directed immediately to pay the same into the treasury of this State, and procure the receipt of the proper officer therefor, which he shall file with the papers in this case. The Sheriff will hold the respondents in his custody until the fines and costs are paid to the clerk.

"WE haven't heard yet," said the editor, looking up from his shears and paste. "But I didn't come to inquire how the Sullivan-Mitchell fight came out," was the response, as the weary Something sat down on a waste basket. "Well, what in the world are you, then?" "Me? oh, I'm only a poor, tired out Solicitude, and I have been sitting up nights with a Boston Independent watching the Democrats.—*Troy Telegram.*

"LOOK here, waiter!" cried Crimsonbeak, who was stopping for a few days at Coney Island; "this haul is not so good as what I got here last summer!" "I don't see why," replied the waiter in some surprise; "it's the same ham, sir!" Crimsonbeak leaves without partaking, and wondering why he didn't think of that before.—*Yonkers Statesman.*

NEVER speculate with your own money, my son, or very soon you may have no money with which to speculate. Don't be selfish. Give your friend's money the first chance.

A MERCIFUL man is merciful to his beast. A Quincy man refused to vacate his premises at the command of his unfeeling landlord on the ground that he had several setting hens and he hadn't the heart to disturb them.

"VAT? You have never been in France, Mese! Zen 'ow are you arrived at so vell speaking ze French?" "Oh, well, Monsieur! at school, you know, the girl who sat next to me at dinner used to eat my fat, and I used to do her French exercises for her; so I got lots of practice!"

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